

# **THE MEDIATION OF THE FEDERAL CIVIL CASE**

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**Mediation - a negotiation or dialogue  
facilitated by a neutral third party**

**“Settlement Conferences.** In every civil case the parties must participate in a settlement conference with a Judge unless otherwise ordered by the Court.” D.N.M.LR-Civ. 16.2(a).

## **Who Should Mediate the Case?**

- The federal magistrate judge assigned to the case
- A different federal magistrate judge by agreement of the parties  
(see, D.N.M.LR-Civ. 73.3 (“Designation of Particular Magistrate Judge to Conduct Settlement Conference. The parties, by unanimous agreement, may choose a particular Magistrate Judge, who may exercise the authority provided by 28 U.S.C. § 636, to conduct a settlement conference.”)).
- A private mediator
- Look for:
  - excellence in the process of mediation
  - knowledge of the substantive legal area(s) involved in the case
  - federal law claims
  - state law claims in diversity (or bankruptcy) cases, or

which are pled along with federal law claims under the supplemental jurisdiction of the federal court

- if applicable, attorneys' fees and litigation expense issues

*When Should the Case Be Mediated? Or, What Needs to Be Known (and By Whom) Before the Case Is Ready to be Mediated*

- "Information is the currency of mediation." Simeon H. Baum, President, Resolve Mediation Services ([www.mediators.com](http://www.mediators.com))
- Identifying preliminary questions of fact and/or law which MUST be known/decided in order for a mediation to have *any* chance of succeeding
- Fast forwarding the flow of information in anticipation of mediation: the value of cooperative behavior
- Truncated disclosure – getting the information essential to a resolution decision
  - Facts – witnesses and documents
  - Experts
- Mediating the Case:
  - ASAP
    - Before costs increase (the "sunk cost" phenomenon) and positions harden
  - But may be too soon if information must be developed to assess case for settlement
  - After Limited (and Focused) Discovery
  - After Discovery is Completed
  - Before Dispositive Motions are:
    - Filed

- Ruled on
- Immediately pretrial
  - Before/after rulings on motions *in limine*
- Post-verdict and while post-judgment motions are pending
- Pending appeal

### What Should be Done Before the Mediation Occurs?

- By the parties and their lawyers
  - Information acquisition
  - Legal issues
  - Insurance issues
  - Preparing the clients
- By the mediator
  - Acquiring information
    - Why?
      - for the mediator's use
      - for benefit of the party who needs it to mediate, *i.e.*, mediating discovery disputes in advance of the mediation
    - How and when?
      - reading the parties' submissions
      - talking to the lawyers pre-mediation
  - Preparing the lawyers
    - Separating the people from the problem - being "soft on the people and hard on the problem." Fisher, Roger and Ury, William, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Penguin Books 1983)

### Who Should Attend the Mediation?

"For each party, at least two persons must attend settlement conferences:

the attorney who will try the case; and the party or designated representative with final settlement authority, other than an attorney of record.” D.N.M.LR-Civ. 16.2(c); *but see*, D.N.M.LR-Civ. 16(2)(d) (“A request to be excused must be made in writing to the Court at least five (5) calendar days before the conference.”).

- The parties, including the *guardian ad litem* in cases involving minors
- The lawyers (all of them?)
- The structured annuity company representative
  - whose? the plaintiff’s? the insurance company’s?
- The adjuster (all of them?) - what is the adjuster’s level of authority?
- Coverage counsel and/or insurance company representatives
  - coverage issues
    - reservation of rights issues
  - duty to defend/duty to indemnify
    - color of law/course and scope of employment
    - intentional versus negligent conduct
    - coverage for punitive damages
  - primary and excess carriers

#### Multiple Parties

- On the plaintiffs’ side
  - dollars per plaintiff versus dollars in the pot
  - pre settlement agreements between and among plaintiffs
    - by percentage
    - by raw dollar figures
- On the defense side
  - relative fault versus joint and several liability
  - contribution
    - by percentage of the pot
    - by dollar figures going into the pot

- The pink elephants in the room
  - Taxation issues
    - “On account of personal physical injuries and emotional distress due to physical injuries,” Sections 104(a)(2) and 130(c) of the Internal Revenue Code, as amended
    - lost wages and benefits claims
  - Medicaid and Medicare Liens

### *The Mediation Session*

- Introductions/opening statements
- The mediator’s confidentiality agreement (*see*, D.N.M.LR-Civ. 16(2)(e))<sup>1</sup>
- Separate Caucuses
- Joint Sessions
  - Meetings with everyone
  - Meetings with just the lawyers
- Keeping the ball rolling

### *Active Listening by the Mediator*

### *Reality Testing by the Mediator with the Parties and Their Lawyers*

- BATNA (“Best Alternative to No Agreement”)
- WATNA (“Worst Alternative to No Agreement”)
- MLATNA (“Most Likely Alternative to No Agreement”)

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<sup>1</sup> “Evidence of settlement offers made, and of statements made, at the settlement conference, regardless of whether made in written, oral or graphic form, will be inadmissible as provided in FED. R. EVID. 408. Statements which are made by any party to the Judge who is conducting the settlement conference, and which are identified by that party as confidential, will not be disclosed by the Judge to any other party. The Judge who is conducting the settlement conference may not reveal to the trial Judge any information about offers made, or about statements made, by any party at the settlement conference, other than whether the case was or was not settled.” DNMLR-Civ. 16(2)(e).

- Settling cases by taking into account what would happen at trial (or in certain civil cases, on appeal – or on interlocutory appeal)
  - Legal Issues
    - “We bargain in the shadow of the law.” (Bargaining in the Shadow of the Law: The Case of Divorce,” Mnookin, Robert H. and Lewis Kornhauser, 88 Yale L.J. 950 (1979))
  - Fact Issues
    - “Just the facts, ma’am.” – what Joe Friday never actually said on Dragnet. *See*, JUST THE FACTS, MA’AM, THE AUTHORIZED BIOGRAPHY OF JACK WEBB, Eugene Alvarez (Seven Locks Press 2001)
  - Credible/Incredible Witnesses
  - Accepting the Unknown
- Direct and Indirect Costs of Litigation
  - Decision Trees (see, e.g., [www.treeage.com](http://www.treeage.com))
    - Direct Costs – Risk Analysis
    - Indirect Costs – Transaction Cost Analysis

### *What Can the Mediation Achieve?*

- Resolution of Litigation
  - Payment of damages
  - Attorneys’ Fees and Litigation Expenses
    - Mediating the merits (the client’s case) first and separate and apart from fees and costs issues
    - Conflict issues that may arise when the merits (the client’s case) and fees and costs issues are mediated together
    - Mediating fee issues between or among multiple plaintiffs’ counsel

- Compensable litigation expenses versus recoverable statutory costs
- Apportionment/contribution/indemnity issues between or among defendants
- Equitable relief, *including* remedies not available in litigation
  - Apologies
  - Reinstatement/instatement, cleansing the employment record or letters of recommendation
  - Expunction of arrest records and/or return of seized items
  - Training/retraining of employees
  - Changes in policies
  - Structured settlement
  - Confidentiality
  - Mutual non-disparagement clause
  - Settlement on the basis of some but not all of the plaintiff's claims and/or as to some but not all of the defendants
  - Agreement to dismiss certain claims or defendants or to file amended complaint with new or different claims on which settlement may be based or new or different parties with whom settlement may be made

### Memorializing the Settlement Agreement

- Writing it down (or putting it on the record) when agreement is reached
- Getting it signed (or stipulated to on the record) before anyone leaves and by all concerned

### *The Almost but Not Quite Done Mediation*

- The agreement in principle
  - When to send the defendant's adjuster back for more authority
- Staying in touch and resurrecting negotiations
  - The follow up call from the Mediator
  - The follow up call to the Mediator
- Reconvening the mediation